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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEX NOEL AGUILAR,

Defendant and Appellant.

F059631

(Super. Ct. No. F09902864)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. James R. Oppliger, Judge.

Gabriel C. Vivas, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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\*Before Dawson, A.P.J., Hill, J., and Kane, J.

A jury convicted appellant, Alex Noel Aguilar, of two felonies: first degree burglary (Pen. Code, §§ 459, 460, subd. (a);<sup>1</sup> count 1) and vandalism (§ 594, subd. (a); count 2). The jury also found true an allegation that a person other than an accomplice was present in the residence at the time of the burglary charged in count 1 (§ 667.5, subd. (c)(21)). The court imposed the six-year upper term on count 1, and declared that offense to be a violent felony within the meaning of section 667.5, subdivision (c)(21). On count 2 the court imposed, and stayed pursuant to section 654, a term of two years. The court also ordered that appellant pay \$9,219.56 in victim restitution, pursuant to section 1202.4, subdivision (f), and awarded appellant 233 days of presentence credit, consisting of 203 days of actual time credit and 30 days of conduct credit.

Appellant's appointed appellate counsel has filed an opening brief which summarizes the pertinent facts, with citations to the record, raises no issues, and asks that this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant has not responded to this court's invitation to submit additional briefing. As we explain below, we have determined the court erred in its award of presentence credit. We will modify the judgment accordingly, and otherwise affirm.<sup>2</sup>

## FACTS

Appellant and Mirna Levato (Mirna)<sup>3</sup> were involved in a romantic relationship of approximately three years' duration; it ended in 2001.<sup>4</sup> Mirna subsequently married Joel

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<sup>1</sup> Except as otherwise indicated, all statutory references are to the Penal Code.

<sup>2</sup> We notified the parties, pursuant to Government Code section 68081, that we would find error in the award of presentence credit and modify the judgment accordingly, were we to otherwise affirm the judgment.

<sup>3</sup> For the sake of brevity and clarity, and not out of disrespect, we refer to Mirna Levato and other persons by their first names.

<sup>4</sup> Except as otherwise indicated, our factual statement is taken from Mirna's testimony.

Levato (Joel). She was at home with him on April 3, 2009, when, at approximately 2:00 p.m., she heard him yell, and saw appellant and his brother, Israel Aguilar (Israel), in the process of “kicking in [the] door.” Eventually, “the door hinge came off[,] ... the door flew open,” and appellant and Israel entered the house, “yelling ... profanity.” Israel was holding a “bat-like object” and appellant was holding a “pipe-like object,” approximately three feet long.

The two intruders were “[a]ngry” and “[v]ery aggressive.” Joel backed up into the living room, followed by Israel. Mirna remained in the entryway, as appellant advanced in her direction, “almost like he was getting ready to fight [her].” He came to within approximately an arm’s length of Mirna, at which point she heard “a big pop, like that crackling sound,” and both she and appellant “ducked down.”

At that point, appellant and Israel left the house, and Mirna went to the living room to check on her husband’s welfare. She saw that the “big bay size window was broken.” As Mirna called 911, she saw approximately 10 people, including appellant and Israel, outside. Mirna’s car was parked outside, and appellant and Israel were striking it with the objects they had been carrying. After approximately two minutes of this activity, appellant, Israel and “the people they were with” got into two cars and drove away.

Attached to the report of the probation officer was an automobile body shop invoice indicating that the cost of repairing Mirna’s car was \$5,626.18 and an insurance company document indicating the “Replacement Cost Value” of the damages to her house was \$3,593.38.

## **DISCUSSION**

As indicated above, the court’s presentence credit award included 233 days of presentence credit, which included 203 days of actual time credit. However, the record indicates appellant was in custody from July 31, 2009, through the date of sentencing,

February 18, 2010, a period of 208 days. And based on appellant's actual time in custody, and the absence of any indication in the record of any of the factors that would reduce his conduct credit, appellant was entitled to 31 days of conduct credit. (§ 4019.) Therefore, appellant is entitled to 239 days of presentence credit, not 233 days as found by the court. We will modify the judgment accordingly.

Following independent review of the record, we have concluded that no other reasonably arguable legal or factual issues exist.

### **DISPOSITION**

The judgment is modified to provide that appellant is awarded 239 days of presentence credit, consisting of 208 days of actual time credit and 31 days of conduct credit. The trial court is directed to prepare and amended abstract of judgment reflecting this modification and to forward a copy of the amended abstract to the Director of the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.